

ARBITRATION ADVISORY

2009-01

The Arbitrator's Role In Accepting Settlement Agreements As Stipulated Awards

July 8, 2009

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INTRODUCTION

Arbitration Advisory No. 96-05, "The Arbitrator's Role in Settlements at the Time of the Hearing" dealt with the limited extent to which an arbitrator should become involved in facilitating a settlement of the parties' fee dispute and the appropriate role of the arbitrator when the parties reach a settlement at the time of hearing. That advisory cautioned arbitrators against involvement in the settlement negotiations between the parties due to the risk of loss of arbitral immunity. The advisory also suggested that if the arbitrator believes that the settlement reached is unethical, illegal or unconscionable, the settlement should not be accepted by the arbitrator as a stipulated award and the matter should either proceed with an arbitration hearing or be dismissed, upon request of the parties, in accordance with the program's rules.

Although stipulated awards in Mandatory Fee Arbitration (MFA) are acceptable, the applicable statutes, Minimum Standards¹ and rules of procedure provide little or no guidance to the arbitrator on his or her appropriate role in accepting such a settlement. This Advisory is intended to address and provide such guidance.

This advisory reiterates that the arbitrator may accept a settlement of the fee dispute reached by the parties as a stipulated award unless the settlement appears to be unethical, illegal or unconscionable. Because the fee arbitrator's authority is limited in scope by the MFA statutes, collateral settlements between the parties that purport to resolve matters that fall outside the scope of that authority, or that are inconsistent with the MFA statutes, should be excluded from the stipulated award. If that is not acceptable to the parties, the parties may agree to dismiss the arbitration and enforce their agreement by other means. Otherwise, the fee arbitration hearing should proceed.

The arbitrator is encouraged to use the attached cover form and Stipulated Award form because it identifies the required and permitted elements of a fee arbitration award.

¹ The State Bar's Guidelines and Minimum Standards ("Minimum Standards") for the Operation of Mandatory Fee Arbitration Programs.

BACKGROUND

As discussed in Arbitration Advisory No. 96-05 “The Arbitrator’s Role in Settlements at the Time of the Hearing,” it is not uncommon for the subject of settlement to be raised by the parties during the fee arbitration proceedings, both prior to and after assignment of the arbitrator or hearing panel. Many local bar fee arbitration programs have adopted Model Rule 19.1, Model Rules of Procedure of the State Bar, which authorizes stipulated awards under either scenario. Even parties approaching a “high emotion” fee arbitration may unexpectedly wish to explore settlement at the time of the arbitration hearing. Settlements are encouraged and may be reached at any time after the parties have initiated fee arbitration but before the award has issued. As a practical matter, any settlement between the parties will be reached prior to the close of the arbitration hearing. Model Rule 19.4 authorizes stipulated awards to document the settlement by the parties.

As that prior advisory cautioned, dismissal of the fee arbitration without a stipulated award based upon the settlement could leave resolution of the fee /cost dispute incomplete and the parties without the speedy and effective remedy that the program was designed to afford under Code of Civil Procedure §1287.4 (judicial confirmation of the award) and Business and Professions Code § 6203 (d) (State Bar assistance for clients with enforcement of unpaid arbitration awards requiring a refund from the attorney). Local programs are therefore encouraged to implement a local rule to employ the use of a stipulated award under such circumstances. An example is Model Rule 19.4, which authorizes the parties to obtain a stipulated award from the program to formalize their settlement.

DISCUSSION

An award issued by a MFA Program must include certain elements required by statute, the Minimum Standards and the program’s rules of procedure. For example, the statute requires that the award “... include a determination of all questions submitted to the panel” [Bus. & Prof. Code §6204(a)]. The Minimum Standards, which all local bar programs must follow, sets forth the required language for every award served by the program (Para. 16). In the case of a stipulated award, which is accepted before any evidence is taken, there are no questions or determinations to be made by the arbitrator other than the amount of fees or costs (or both), if any, that are to be paid by one party to the other party pursuant to the settlement.

A stipulated award incorporating a settlement may provide needed protection of the interests of the parties as long as the incorporated settlement is not unethical, illegal, or unconscionable. An arbitrator who decides that a settlement is unethical, illegal or unconscionable should decline to accept the settlement as a stipulated award and may instead proceed with the fee arbitration hearing or dismiss the matter in accordance with local program rules at the request of the parties.

If the settlement reached by the parties contains matters that fall outside the scope of the subject matter jurisdiction of the MFA program, such matters should be excluded from the stipulated award. Similarly, the parties might agree to matters expressly prohibited by statute from being included in an award, such as an award of malpractice damages or attorney’s fees and costs [Bus. & Prof. Code § 6203(a)]. Examples of prohibited or troubling provisions that may be part of the parties’ agreement in addition to resolving the fee and/or cost dispute include:

- waiver of malpractice liability,
- granting of injunctive relief [Civil Code § 1542],
- waivers of known and unknown claims,
- agreements conditioned on the withdrawal of a State Bar disciplinary complaint or other proceeding,
- an agreement not to file for bankruptcy,
- an agreement to pay punitive damages,
- a waiver of future conflicts of interests,
- the granting or forfeiture of pecuniary interests such as liens on real or personal property,
- consideration of fees that were set by statute, or
- an award of fees beyond the statutorily permissible limits established in medical malpractice, federal tort claims, workers compensation, and social security actions.

A stipulated award which incorporates an agreement that purports to grant a party rights or remedies beyond or in violation of the statutory parameters of the MFA program would necessarily exceed the arbitrator's authority. Exceeding arbitral authority presents a fertile ground for vacating the award and/or claiming the loss of arbitral immunity. Therefore, again, the stipulated award should exclude such collateral agreements.

In order to assist the arbitrator to exclude such collateral matters from a stipulated award, the attached Stipulated Award form should be used to convert the fee dispute component of the parties' settlement into a stipulated award, if that is acceptable to the parties.

WHAT SHOULD THE STIPULATED AWARD CONTAIN?

The stipulated award should contain the names of the parties, the amount and terms of payment of fees or costs, or both, if any is agreed, the responsible attorney, and such other terms as are consistent with the jurisdiction and scope of the MFA program. In most cases the arbitrator is encouraged to attach the Stipulated Award form, especially if the parties' agreement includes a resolution of matters outside the limited scope of the MFA program.

If the parties need an extended amount of time to complete the agreement, the arbitrator may offer to continue the hearing to perform those terms.

WHAT IF THE ARBITRATOR CANNOT APPROVE THE PARTIES' AGREEMENT?

If the settlement reached by the parties grants rights or resolves claims that were not properly a subject of the arbitration (such as a waiver of a malpractice claim), these are not properly before the program and an arbitrator is without jurisdiction to make such an award.

The arbitrator should advise the parties of the limits of his or her arbitral authority under the program and allow them to reach a determination in an alternate proceeding, such as a stayed civil action or arbitration in another forum. The parties should be informed, however, that if the settlement involves a refund to a client, only an award in mandatory fee arbitration will be enforced by the State Bar.

In situations where the agreement appears to be illegal, unconscionable or unethical based on the evidence submitted prior to the hearing, such as the request and reply forms or other documentary evidence exchanged in advance of hearing, the arbitrator may decline to make such an award and

may want to advise the parties accordingly in order to afford them an opportunity to reach an agreement absent those terms. In the absence of a stipulated award, the arbitrator must proceed with the hearing or dismiss the arbitration upon the request of the parties.

Under circumstances where the arbitrator accepts only the permitted fee dispute component of the settlement by using the attached Stipulated Award form, it is foreseeable that the result might be two separate agreements, one served by the program and enforceable through the MFA statutory scheme and the other subject to scrutiny and enforcement by the courts.

WHAT ROLE MAY THE ARBITRATOR PLAY?

Participation by the arbitrator in the settlement process itself or in any attempt to mediate the controversy is ill advised due to the potential loss of the arbitrator's immunity as afforded by Business and Professions Code § 6200(f).

Although the recent case of *Morgan Phillips, Inc. vs. JAMS/Endispute, L.L.C.* (2008) 140 Cal. App. 4th 795 was not a mandatory fee arbitration case, it provides an excellent example of the loss of immunity from liability by both the arbitrator and the arbitration program when an arbitrator assumes the role of mediator and becomes personally involved in trying to settle a dispute [See Arbitration Advisory No. 07-01 for a discussion of the potential loss of arbitral immunity].

CONCLUSION

A fee arbitrator may accept a settlement between the parties as a stipulated award. In such cases, the arbitrator may issue a stipulated award by attaching and incorporating by reference a copy of the parties' written settlement agreement. However, in no event should a fee arbitrator accept a settlement that appears to be unethical, illegal or unconscionable.

In addition, a settlement that includes a resolution of matters that are beyond the limited scope of the mandatory fee arbitration program or that are expressly prohibited by the MFA statutes should be excluded from the stipulated settlement. To assist the arbitrator, the attached Stipulated Award form should be used to identify the required and permitted elements for a stipulated award.

Use of the Stipulated Award form may also avoid the unintended approval of agreement terms that may be beyond the scope of a fee arbitration or, in rare cases, which may be illegal, unethical, or unconscionable.

**AWARD OF THE _____ FEE ARBITRATION PROGRAM
PURSUANT TO STIPULATION OF THE PARTIES**

In the matter of the arbitration between:

Client

Case No. _____

Attorney

INTRODUCTION

This matter was assigned to the undersigned Panel Chair/was not assigned to a Panel Chair and this award is therefore signed by the Program Chair. The Petitioner was/was not represented by counsel, [TYPE NAME HERE]. The Respondent was/was not represented by counsel, [TYPE NAME HERE]. The parties entered into a written stipulated award to resolve their dispute which is the subject of this arbitration and submitted their stipulated award for incorporation in a binding fee arbitration award of this Program. **GOOD CAUSE APPEARING THEREFORE:**

AWARD

The STIPULATED AWARD attached hereto is incorporated herein by this reference, its terms and conditions are approved and made part of this binding award, and the parties are directed to perform its executory terms, all with the same force and effect as a binding award of this Program after an arbitration hearing.

Arbitrator Name (Print)

Arbitrator Name (Signature)

Dated

OR

Program Chair (Print)

Program Chair (Signature)

Dated

REMINDER: The award *must* be sent to the _____ Mandatory Fee Arbitration Program. **DO NOT** send it directly to the parties. The MFA Program will serve a copy of this award on the parties, and a photocopy will be sent to the arbitrator(s). Thank you.

STIPULATED AWARD

[USE THIS FORM WHERE THE PARTIES ARE SETTling THEIR MATTER AFTER A HEARING HAS BEEN SET OR AT THE TIME OF HEARING]

1. The Parties agree that the total amount of fees, costs or both that should have been charged in this matter are: \$ _____
Of which the client has paid: \$ _____
The subtotal of fees still owed attorney or of any refund due client is: \$ _____
2. The Parties agree that pre-award interest
[] shall be awarded in the amount of \$ _____
[] shall not be awarded
3. The Parties agree that the arbitration filing fee of \$ _____
Which was paid by _____ shall be allocated:
Client: \$ _____
Attorney: \$ _____
4. The Parties agree that the net amount due to attorney or to client is \$ _____
5. Accordingly, the Parties agree that the following payment shall be made:
(a) Client, _____ shall pay attorney, _____
\$ _____
OR
(b) Attorney, _____ shall refund client, _____
\$ _____

The individual responsible attorney(s) is/are _____
OR
(c) Nothing further shall be paid by either attorney or client.
6. Payment terms, if any: _____
7. The Parties have read and understand the terms and conditions of this agreement and intend to be bound by this Stipulated Arbitration Award.
8. If any party to this agreement is an entity the individual executing this agreement represents that he or she has full authority and consent to enter into this agreement on behalf of such entity.
9. This is intended to be a fully integrated agreement that may not be modified other than in a writing signed by all parties.

Party Name (Print)

Signature of Party

Dated

Party Name (Print)

Signature of Party

Dated